15, 1969

(15)

No. 28 of 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN :-

PUBLIC PROSECUTOR — APPELLANT

- and -

P. YUVARAJ — RESPONDENT

RECORD OF PROCEEDINGS

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EX D3	-	Yong Peng Report No. 315/66
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B E T W E E N :-

PUBLIC PROSECUTOR — APPELLANT

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RECORD OF PROCEEDINGS

No. 1

CHARGE SHEET

In the Sessions Court of Johore at Batu Pahat

No. 1
Charge Sheet, 22nd June, 1966.

Malaya

In the ~~Sessions~~ / Magistrates Court of Johore sitting at B/ Pahat

Charge Sheet

Name of accused P. YUVARAJ — Arrest No. BA: 51 of 1966 Kek

Address of accused BALAI Polis, Yong Peng. — Yong Peng RPT 315/66

Charge: That you on the 21st day of June, 1966 at about 7.40 p.m. at Quarters No. PWD.CJ.784 Jalan Labis, Yong Peng, in the state of Johore, being an agent of the Government of the States of Malaysia, to wit, a Police Inspector attached to Yong Peng police station did corruptly accept gratification for yourself to wit, $250/= cash, from one Ling Choon Seng as an inducement for forbearing to do an act in relation to your principal's affairs, to

In the Sessions Court of Johore at Batu Pahat

No. 1
Charge Sheet, 22nd June, 1966. (Contd.)

wit, to refrain from taking action against him for operating the illegal 36 digit lottery (Chee Fah), and that you thereby committed an offence punishable under Section 4(a) of the Prevention of Corruption Act No. 42 of 1961.

Plea C.R.E. & C.T. Particulars of Bail $2000/= Bail .313997 Bond 22.6.66 No.

Prosecuting Advocate or officer A.S.P. Che Mon

Findings Not Guilty

Adjournments To (date)	Reasons	Initial
25.6.66	M	A.R.
23.7.66	M.B.E.	Yusof
19.20.21/ 11/66	H	

Sentence and/or other order and/or bond

Acquitted and discharged.

Certified true copy,

Magistrate, Batu Pahat.

Date of termination of proceedings 21/11/66

Signed W. Satchithanandhan

No. 2

GROUNDS OF JUDGMENT

In the Sessions Court of Johore at Batu Pahat

No. 2
Grounds of Judgment, 21st November, 1966.

The undermentioned charge was preferred against the accused:-

"That you on the 21st day of June, 1966, at about 7.40 p.m. at Quarters No. PWD. C.J. 784, Jalan Labis, Yong Peng, in the State of Johore, being an agent of the Government of the States of Malaysia, to wit, a Police Inspector attached to Yong Peng Police Station, did corruptly accept gratification for yourself, to wit $250/- cash, from one Ling Choon Seng as an inducement for forbearing to do an act in relation to your principal's affairs, to wit, to refrain from taking action against him for operating the illegal 36 digit lottery (Chee Fah), and that you thereby committed an offence punishable under Section 4(a) of the Prevention of Corruption Act, No. 42 of 1961".

His Lordship Justice Ali Bin Hassan, in the case of Mohamed Yatim bin Hussein v. P.P. (1) - a case under Section 4(a) of the Prevention of Corruption Act, No. 42/61, said:-

"Broadly speaking, the necessary ingredients required to be proved for an offence under this provision are:-

(1) That the taking or receiving of the gratification must be shown to have been corruptly received as an inducement or reward, and

(2) That the inducement or reward was for doing or forbearing to do an act in relation to his principal's affairs or business.

But for the provision of Section 14 of the Act the normal rule in Criminal law is for

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(1) Perak Criminal Appeal No. 63/63.

In the Sessions Court of Johore at Batu Pahat

No. 2
Grounds of Judgment, 21st November, 1966.
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the prosecution to prove these two ingredients."

His Lordship Justice Ali bin Hassan, further said:-

"Section 14 reads:- "14. Where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward, as hereinbefore mentioned, unless the contrary is proved."

"The effect of this section is to raise a presumption of corrupt motive on a person, who is in the employment of a public body, upon proof that any gratification has been paid, given to or received by him thereby relieving the prosecution of the burden of proving the first ingredient. It does not affect the burden of proving the second ingredient, which remains with the prosecution." (1)

The prosecution case in a nutshell is this.

The accused it is alleged received $300/- on June 15, 1966 from the complainant (P.W.1) being a payment for the release of betting slips which the accused seized on a raid of his syndicate on June 4th.

And that on 21st June that accused accepted $250/- as a corrupt gratification from the complainant to refrain from taking action against him for operating the illegal 36 character lottery - which is the subject of the charge.

The accused denied he received $300/- on June 15th.

As for the alleged payment of $250/- on June 21st the accused said the complainant handed him the money saying it was from (Inspector) Shukor to one Toh, the Manager of the Union Trading Co., to whom Inspector Shukor owed money for the purchase of goods.

It may be appropriate, at this point, to investigate in detail the evidence leading up to the alleged payment of $300/- on June 15th and to state the reasons for rejecting that allegation as a complete fabrication by the complainant P.W.1.

According to P.W.1, his friend Poi Tee (P.W.10) told him on May 3rd, 1966 that the accused wanted to see him.

Incidentally, the prosecution impeached the credit of Poi Tee under Section 113 of the Criminal Procedure Code (F.M.S. Cap 6).

And it was conceded by Counsel for the Prosecution on objection by Counsel for the Defence that the evidence of P.W.1 relating to what Poi Tee told him would be inadmissible as heresay.

P.W.1's evidence is intimately connected with what was told to him by Poi Tee and may have to be referred, notwithstanding that parts of it are hearsay, in order to render a proper sequence to the narrative of the prosecution case.

Now to revert to P.W.1's evidence.

P.W.1 said that on May 3, 1966 he went to the accused's house with Poi Tee and told him he was assisting in running the 36 character lottery and asked the accused to help him. And the accused told him he would help him, he said.

The next day, that is May 4th, 1966 he went to accused's house with Poi Tee, and there according to P.W.1, Poi Tee told him the accused wanted a desk Chair. The accused also told Poi Tee, he wanted to be taken to Kluang to have some food. On May 5th P.W.1 said he went to Kluang with the accused, P.W.9 and two others.

So much for the events of 3rd, 4th and 5th May.

With great respect, it must be stated the evidence of P.W.1 referred to hereinbefore as to the events on 3rd, 4th and 5th May is of a prejudicial nature; and this was conceded by Counsel.

In the Sessions Court of Johore at Batu Pahat

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Grounds of Judgment, 21st November, 1966.
(Contd.)

His Lordship, Lord Du Parcq. in the Privy Council case of Noor Mohammed v. R. (2) referred to a 'proposition not being a rule of law but of judicial practice' when he said that:-

> "Cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused, even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the Judge."

His Lordship Roskill, J., whose judgment is referred to in the case of R.V. Herron (3) said:-

> "A trial Judge always has an overriding duty in every case to secure a fair trial, and if in any particular case he comes to the conclusion that even though certain evidence is strictly admissible, yet its prejudicial effect once admitted is such as to make it virtually impossible for a dispassionate view of the crucial facts of the case to be thereafter taken by the jury, then the trial judge, in my judgment should exclude that evidence".

Now turning to the events in June.

According to P.W.1 on June 4th he was informed by P.W.3 that three collectors, one of them being P.W.2, in his 36 character lottery syndicate had been arrested.

P.W.1 admitted he was one of the partners of the syndicate.

He said that he then went to Lorong No. 6 at Yong Peng and approached his three partners but the accused chased him away. He then went to the Police station and saw his three partners in the lock-up. A Police Sergeant refused to permit him to see the accused.

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(2) 1949 (1 A.E.R.) 365.

(3) 1966 (2 A.E.R.) 26.

P.W.1 said that on the same night, that is, June 4th he went to the accused's house with Poi Tee and requested the accused to return the betting slips. According to him the accused agreed to return half and also demanded $350/- for each of the persons, arrested.

So much for the events on June 4th, the day of the raid.

The events after June 4th and before the 15th of June, when it is alleged by P.W.1 that he paid $300/- for the return of the slips may be considered at this point.

P.W.1 said that on June 6th, Poi Tee brought to him 25% of the betting slips, but he did not pay any money to the accused as he had promised to return half and had returned only 25%.

Continuing his evidence, P.W.1 said that on June 9th he went with Poi Tee to accused's house and the accused told him that he had been cheated and then demanded $650/-. P.W.1 said he replied that he had to consult his partners and returned. On the 10th of June, P.W.1, told Poi Tee that the partnership had agreed to give $200/- to the accused.

On the 12th of June, P.W.1, said that Poi Tee met him again on a road at Yong Peng and told him that the accused would not accept less than $400/-. He said he did not agree.

So much for the events of the 4th, 6th, 9th, 10th and 12th of June.

The events of June 15th may now be considered.

P.W.1 said that he went to the accused's house at about 8 p.m. and gave him $300/-. There was someone in his house then. The payment of $300/- was for the return of the slips, he said.

P.W.1 also added that on the 15th when he went to the accused's house to pay the $300/- the accused demanded a monthly payment of $250/- "because of the 36 character lottery", to which he agreed.

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So much for the events on June 15th.

It may be expedient at this point to refer also to the evidence of P.W.1 relating to the events on June 21st - the date which is the subject of the charge - as that will conclude a review briefly of his evidence-in-chief.

P.W.1 said that on June 21st he was acting on the instructions of P.W.6 (D.S.P) Stevenson.

He said that on the 21st of June at about 6 p.m. he saw the accused's car parked in front of Chop Yong Seng, at Yong Peng. He then rang up to the accused who told him to go home.

In the words of P.W.1:-

> "I went there in my car as told. I went into the house. I did not see the accused. I saw a Chinese lying on the sofa. I went out and stood at my car about 10 feet away from the accused's main door. Accused came out from the kitchen and he came up to me. He asked me whether I brought the money. I told him I did. I further asked him whether he wanted to make use of the money. I handed him $250/-. The $250/- is my money. On the 21st of June I was acting on the instructions of D.S.P. Stevenson."

It is now necessary to scrutinise and evaluate the evidence of P.W.1.

His evidence under cross-examination was a tissue of lies, material contradictions of his evidence-in-chief and deliberate falsehoods, some of which are enumerated with particularity hereunder.

1. PW: I said I know a person called Shukor. He is a police Inspector. I have spoken to him. He was the person in charge of Yong Peng before accused came. I have spoken to Inspector Shukor. He asked me about my problem.

   In the next breath P.W.1 said that he had never talked to Inspector, but only smiled at him.

2. P.W.1 said that he did not know where Inspector Shukor lived. But he changed his story in the next breath and said that Inspector Shukor lived in the same house where accused lived and that he had visited Inspector Shukor's house to give him two bottles of liquor.

3. P.W.1 said that he did not know who was the Inspector in charge before Inspector Shukor. In the next breath he said he knew that before Inspector Shukor there was a Punjabi Inspector and that he knew him.

4. P.W.1 said he remembered the day three of his partners were arrested. He was obviously referring to the 4th of June when the accused arrested the three partners. He said that prior to this his syndicate was never disturbed by Police Officer.

5. P.W.1 however admitted later that Inspector Shukor did arrest some of his syndicate and a tailor was arrested by Inspector Shukor.

P.W.1 said that on every occasion he went to see the accused he went with Poi Tee. On the 15th he said that Poi Tee was playing Badminton and did not come though he asked him to come. This another fabrication by the accused under incisive cross-examination.

6. P.W.1 in his evidence-in-chief said that on June 4th (the day of the raid) when he went to the accused's house the accused demanded that he should give $350/- for each person whom he arrested.

P.W.1 in his Police Report Ex.D3, with reference to June 4th said:-

> "He told me he would return some of the documents seized by him if I would pay him $750/-. I pleaded with him and he eventually asked for $650/-."

Under cross-examination P.W.1 said that he pleaded with the accused but he the accused did not mention any figure, but that was what Poi Tee told him.

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It is clear that P.W.1's statement in his Police Report Ex.D3 is false.

When asked why he said in the Police report that the accused eventually asked for $650/-, P.W.1 said he could not remember, as the matter occured six months ago and that if he has reported it as such "perhaps the accused has said it."

Under further cross-examination he said:-

> "Poi Tee told me the sum was $600/-. The sum of $650/- was not mentioned by anybody. So my evidence and my report that the accused asked for $650/- perhaps accused may have asked for $650/-. I am not sure."

P.W.1's evidence-in-chief, that the accused demanded $350/- for each of the person arrested and his statement under cross-examination that what he said in his Police report is correct, is perjury of a gross and vicious kind.

7. P.W.1 in his evidence-in-chief said he went to the accused's house on 4th June to request the return of the betting slips. Under cross-examination he said he went there to get the offences N.O.D.

8. P.W.1 in his Police Report Ex.D3 said on 15.6.66 the accused sent for him and he visited his house.

Under cross-examination he said that on the 15th nobody gave him any message.

When asked why he said to the contrary in his police report, P.W.1 said that the accused asked him to see him on the 15th and that he the accused had asked Poi Tee on the 13th to see him on the 15th.

Then P.W.1 speaks of a fact.

> "In fact I told Poi Tee to ask accused whether I could see him on the 15th."

Whenever P.W.1 was confronted under cross-examination with his own falsehoods he chose Poi Tee as a refuge and attributed his knowledge to information derived from him.

9. P.W.1 referring to his visit to the accused's house on June 21st said that the accused took out a handkerchief from his trouser pocket, took out the notes from his shirt pocket and wrapped them with the handkerchief.

P.W.7 the Chemist said that he was asked by P.W.6 to examine the handkerchief but he could not find my anthracine on the handkerchief.

Having seen and carefully heard P.W.1 in the witness box and having scrutinised his evidence with care the Court was led to the irresistible conclusion beyond any reasonable doubt that P.W.1 was an unconsionable liar and a thoroughly unreliable witness.

His Lordship Justice Ali bin Hassan in the case of Mohamed Yatim bin Hussein v. P.P. (4) said:-

"In the event that the trial Court finds that the complainant is an unreliable witness, it becomes obviously necessary to look for corroborative evidence which can support his story."

It is therefore necessary at this point to examine the evidence of other prosecution witnesses to ascertain to what extent, if any, they corroborate his story.

P.W.2 was one of the three persons arrested by the accused on 4.6.66. He said he was charged in Court the following day, was released on bail and that his case is pending.

P.W.2 said "at times we pay to accused. Sometimes we do not pay." He said that "since June $250/- was paid to the accused. Only once $250/-

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(4) Perak Criminal Appeal No. 63/63.

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was paid to accused. As far as I know our syndicate paid only once. Later the sum of $300/- was paid to the accused on 15.6.66. The $250/- was paid before that. I can't remember the date. The money was paid before my arrest. The $250/- was paid before my arrest. I was told so by P.W.1. I am making no mistake. I am sure of this."

Under re-examination he said, "I am quite positive the $250/- was paid before the 4th of June".

It is necessary to evaluate the evidence of P.W.2.

P.W.2 said that he was sure, positive and making no mistake the $250/- was paid to accused before his (P.W.2's) arrest on the 4th of June, and that this was told to him by P.W.1.

This is a preposterous lie, because the Prosecution allege through P.W.1 that only two payments were made. $300/- on June 15th, and $250/- on June 21st.

P.W.2 who admits he is partner of P.W.1's syndicate, said that all the information about the $300/- paid on June 15th and of the $250/- paid before the 4th of June, was given to him by P.W.1.

Having seen and heard P.W.2 in the witness-box the Court found that he was not worthy of any credit.

He gave the distinct impression of having come to Court to bolster his partner P.W.1 and to buttress his evidence and in doing so without any scruples tried to multiply the number of the alleged payments to the accused by saying: "at times we pay to accused", cunningly insinuating that there could be a number of other occasions when money was paid to the accused, when there is not a shred of evidence to that effect from the complainant himself.

The evidence of P.W.9 may be considered at this point.

He said he knew the accused and P.W.1. He said he could not remember the date but it was

about 7 p.m. and 8 p.m. that he visited the accused's house with P.W.1 and Poi Tee. The accused was then there, he said.

He said that during this visit he was seated at a dining table and P.W.1 had a conversation with the accused, "about the arrest of the Chee Fah" and "regarding money matter". Subsequently he said that his attention was concentrated on the music and that he did not hear the details of the conversation or pay attention to the conversation.

It is necessary to scrutinise his evidence and look for corroboration of P.W.1's evidence.

Firstly P.W.9 mentions no date of his visit and as such it is a dateless piece of evidence.

Secondly his evidence that the conversation between P.W.1 and accused was about "Chee Fah and money matter" is contradicted by his own evidence that he did not hear the contents of the conversation.

Thirdly even accepting his evidence that the conversation was about "Chee Fah and money matter", it must with respect be stated that piece of evidence is a vague generalisation capable of equivocal interpretations and diverse inferences.

In the case of Tai Chai Keh v. P.P. (5) the Court of Criminal appeal said:-

> "Where there is more than inference which can reasonably be drawn from a set of facts in a criminal case, the inference most favourable to the accused should be adopted."

In the circumstances no reasonable inference can be drawn that the conversation regarding "Chee Fah" and "money matter" had any unequivocal connection beyond any reasonable doubt with alleged payments on June 15th and June 21st.

The Court found as a specific fact, upon the evidence, and after seeing and hearing the

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(5) 1948-49 M.L.J. Supplement.

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witnesses, that P.W.1 never in fact visited the accused on the 15th of June, and as a specific fact that P.W.1 never paid $300/- to the accused on June 15th, or at any other time.

It may be appropriate to state the reasons for arriving at these findings, before proceeding to consider the rest of the evidence, and the allegation that $250/- was accepted as a corrupt gratification by the accused on 21st of June, which is the subject of the charge.

1. P.W.1 is an unreliable witness and there is no source of corroboration to support his evidence that he paid $300/- on the 15th of June.

2. According to P.W.1:-

   On 3.5.66 he visited accused with Poi Tee.

   On 4.5.66 he visited accused with Poi Tee.

   On 5.5.66 he went to Kluang with accused and three others.

   On 4.6.66 he went to accused's house with Poi Tee and P.W.9.

   On 9.6.66 he went to accused's house with Poi Tee.

   On the 21.6.66 when he handed over $250/- the anti-corruption people were waiting down the road.

   But on the 15th of June he went alone and paid the accused $300/-.

   It is startlingly surprising and incredulous that P.W.1 who seems to have taken the precaution of having somebody present on every other visit to the accused should go it all alone to visit the accused on the 15th, and to heap incredulity upon incredulity, to pay $300/-.

3. P.W.1 in his evidence said that on every occasion he went with Poi Tee but on June

15th Poi Tee was playing Badminton and did not come though he asked him to come.

Now P.W.1 was going on an important mission on June 15th, purportedly after much haggling to pay $300/-.

Had P.W.1 said in evidence that although Poi Tee was not able to come, he had nevertheless either told or whispered to Poi Tee that he was going to pay $300/- on the 15th, it may lend a little credence to his story.

But nothing of that sort happened.

4. P.W.1 in his evidence-in-chief said that he paid $300/- on the 15th for the return of the slips.

Under cross-examination P.W.1 affirmed.

"The position on the 15th morning was as on 9.6.66. No money was paid to the accused and no lottery slips were returned. I was not going to pay any money, unless my lottery slips were returned. On 15.6.66 I did not receive any lottery slips. I did not ask for the slips on the 15th."

P.W.1's assertion on the one hand, that he was not going to pay any money to the accused unless the slips were returned, and his assertion on the other hand, that he paid $300/- even though they were not returned is a violent contradiction in terms, and false to the very core.

5. When P.W.1 was confronted under cross-examination with the paradox that he had allegedly paid $300/- for a bargain that was not on the 15th, P.W.1 was quick to fabricate a statement that the accused had earlier said he had burnt the slips.

Nowhere in his evidence-in-chief is the slightest suggestion by P.W.1 that slips were burnt or would be burnt.

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The accused in his report of the raid on 4.6.66 Ex.P10, has mentioned the number of exhibits seized, and there can be no doubt that if the exhibits had in fact been burnt, evidence would have been led by the Prosecution that the exhibits in question could not be found.

6. P.W.1 in his evidence said that the accused returned 25% of the slips but that he asked Poi Tee to return them as half the number of slips had not been returned.

15 P.W.1 suggesting that he paid $300/- on the 15th, for having had only a glance at 25% of the slips on the 6th of June.

Nothing can be further from the truth.

7. P.W.1 did not project himself upon the evidence or by the impressions he left on the Court, that he was a man who was generous with his money and therefore likely by his conduct to be a person who will part with his money either by way of a bribe or any other way. For throughout the whole episode no offer to any money or gratification moved from P.W.1 to be accused.

He would have the Court believe that demands for money proceeded only from the accused to him.

8. P.W.1 in his evidence-in-chief, with reference to his alleged visit on the 9th to the accused's house said that on this occasion the accused reduced the amount to $650/-. But P.W.1 said: 'I told him I could not give him my decision, as I had to go back and consult with my other partners.'

It is clear that before any payment could be made P.W.1 had to have a consultation with his partners.

But there is not a shred of evidence from P.W.1 that he had in fact consulted his partners before the payment of $300/- on the 15th of June, or the faintest suggestion even from a partner himself who

gave evidence (P.W.2) that he had in fact been consulted.

The events of June 21st, the subject of the charge, may now be considered. The complainant lodged his report Ex.D3 on the 16th and he made no further visits to the accused's house until June 21st.

P.W.6 said that on 21st June, 1966 he proceeded to Yong Peng, with a police party, P.W.1 and the Chemist (P.W.7) having the previous day taken $250/- from P.W.1 to the Department of Chemistry.

He said that on arrival at Yong Peng at 5.30 p.m. he instructed P.W.1 to go to Yong Peng to ascertain whether or not accused was in and to return to the rendezvous which he did.

P.W.6 then placed $250/- in the shirt Pocket of P.W.1 and asked him to proceed in his car to the accused's house and to hand over the money to the accused. P.W.1 returned 15 minutes later. P.W.6 spoke to him and then proceeded on foot to the accused's house.

P.W.6 said that as soon as he got there he took a photograph of the accused who was seated at a dining table.

He also saw a male Chinese who identified himself as Christopher Hue seated on a chair.

P.W.6 then informed the accused that he was there on official duty and asked if any one had visited him earlier to which the accused answered, 'Yes'.

P.W.6 then proceeded to give in evidence the answers given by the accused to the further questions put by accused - answer which are on record.

The Court at this stage decided to hold a trial-within-a-trial to ascertain whether the answers given by the accused to P.W.6 were made after his arrest in which case the answers would not be admissible unless the Court was

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satisfied that before making such statements a caution was administered to the accused, under Section 15(b) of the Prevention of Corruption Act, 1961.

The precise point for determination is therefore to ascertain at what point of time the accused was arrested. The evidence of P.W.6, must be scrutinised, to this end.

P.W.6 under cross-examination said:-

'If the accused would have attempted to go out I would have stopped him. So from the time I entered the house I would have stopped him from leaving the room. His movements were restricted to this house.'

Section 15(1) of the Criminal Procedure Code states:-

'In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there is a submission to the custody by word or action.'

It is clear, having regard to the evidence of P.W.6 that the accused was confined to his house from the moment P.W.6 entered his house and that the accused had submitted to the custody of P.W.6.

In the case of Tan Shu En and Another v. P.P. (6) it was held:-

"The test is could the person concerned have walked away if he had wished to do so. This is well expressed in the local case of Sambu v. Rex."

Mallal's Criminal Procedure Code, (7) states:

"Arrest is a restraint of a man's person or his submission to the custody that he

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(6) 1948, 14 M.L.J. at page 201.

(7) 4th Edition at page 50.

may be held to answer a charge made against him."

P.W.6's evidence that from the time he entered the house he would have stopped the accused leaving the room and his further statement that the movement of the accused were restricted to his house, placed the accused in the category of a person arrested from the moment P.W.6 entered his house.

P.W.6 said in answer to a question by the Court that no caution was administered.

For the foregoing reasons the Court was of the opinion that the answers given by the accused after his arrest would not be admissible in evidence.

Now to continue with the evidence-in-chief of P.W.6.

He said that on a metal-ash-tray on the dressing table in the bedroom about 40 feet away from where accused was seated he saw $250/-. He found that the numbers of the notes tallied with the numbers of Ex.P4 - a list containing the numbers of the notes was handed by P.W.1 to P.W.6 on June 20th.

This evidence of P.W.6 together with the evidence of the Chemist P.W.7 established beyond reasonable doubt that the marked notes Ex.P2 was in the possession of the accused.

In the case of P.P. v Eric Lewis, (8) His Lordship Justice Ong said with reference to the presumption under Section 14 of the prevention of Corruption Act 1961:-

> "What must be proved for the purposes of this case, before the presumption arises, is merely receipt of gratification and nothing more. "Gratification" includes "Money" (see section 2). Here the $10/- in marked notes was found in the respondent's shirt pocket. His possession necessarily implies 'receipt' because the same notes had

(8) Criminal Appeal No. 51/64 High Court, Kuala Lumpur.

In the Sessions Court of Johore at Batu Pahat

No. 2
Grounds of Judgment, 21st November, 1966.
(Contd.)

been kept by Senior Inspector David Mahadeyan until about 3.25 p.m. when he handed them to Loh and at 4 p.m. the Inspector found them among cash taken out of the respondent's pocket. Whether the money was "paid or given" by Loh, it was "received" by a person in the employment of Government. The statutory presumption thereupon arises which the respondent had to rebut."

The Court was of the opinion, on the authority of P.P. v. Eric Lewis that the statutory presumption under Section 14 arises on the more receipt of gratification and nothing more.

It may be convenient therefore at this point to consider the accused's evidence in rebuttal of the presumption under Section 14 of the Prevention of Corruption Act, 1961, and to postpone for later consideration the question whether the gratification was received as an inducement for forbearing to do an act in relation to his principal's affairs.

There is one preliminary matter which may conveniently be disposed of at this point.

The accused in his defence stated that he made a statement after he was cautioned at the police station, following his arrest. That statement was not produced in evidence by the Prosecution.

Counsel for the accused objected strenuously to its non-production and urged that the Court should invoke Section 114(g) of the Evidence Ordinance, while Prosecuting Counsel contended that the Prosecution had a discretion whether or not to produce it adding that the caution statement was to be treated on the same footing as a prosecution witness.

Having regard to the view advanced by Prosecuting Counsel - and no one can quarrel with that view - the Court did not draw any inference unfavourable to the Prosecution on account of the non-production of the caution statement except, to treat it as a matter for comment.

The case of R.V. Thomas Michael Treacy (9) is a case in point.

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(9) 1944 (2 A.E.R.) at page 229.

During the cross-examination of the appellant counsel for the prosecution put to the appellant two obviously forged documents which had been found in the appellant's possession. These documents were not made exhibits, nor were they proved in any way, and their existence was not known to Counsel for the defence.

His Lordship Humphreys J. delivering the Judgment of the Court of Criminal Appeal said:-

"We are told that the prosecution had in fact evidence as to where they had been typed, and on what machine they had been typed; it was a machine to which at some time the accused had access, or at all events was used in the place where he worked. If that course had been adopted, they would have become exhibits in the case. They would have been open for the inspection and examination of those who appeared for the accused. Nothing of that sort was done. It is not disputed in the case that what was done with them was that the prosecution just kept them up their sleeve. They decided not to put them in. No reference was made to them at the police Court."

And at page 234:

"The prosecution have no right to pick out such evidence as they think right to give a jury in a criminal case. They have no right of that sort at all. Their duty is to put before the jury every fact that it is relevant to the issue being tried by them and known to the prosecution and to prove it, whether in fact it helps the accused or is against him. That is the duty of the prosecution."

And at page 236:

"In our view, statement made by a prisoner under arrest is either admissible or it is not admissible. If it is admissible, the proper course for the prosecution is to prove it, give it in evidence, let the statement if it is in writing be made an exhibit, so that everybody knows what it is and everybody can inquire into it and do what they think right about it."

In the Sessions Court of Johore at Batu Pahat

No. 2
Grounds of Judgment, 21st November, 1966.
(Contd.)

It may be the view of the prosecution that it is not their duty to gratify every whim and wish of the accused; but it would appear, with great respect, that the approach to the exercise of that discretion should be not whether every wish of the accused should be gratified, but whether it is "reasonable to gratify that wish"; and it is submitted, with great respect, that the production of the caution statement is a reasonable wish - reasonable because it would secure a fair trial for the accused.

Incidentally it was submitted by Defence Counsel that the account given by the accused in his caution statement is the same account given by the accused in his defence.

In the case of Wee Chin Chong v. P.P. (10) it was said:-

> "In such cases such as gaming, where by doing an act a presumption under the Ordinance is raised against the accused person, if the prosecution have the evidence which rebuts that presumption in their possession to the knowledge of the accused persons, but do not use it, then it can be said that no presumption properly arises against the accused person, as the prosecution have not brought out evidence in favour of the accused in their possession rebutting such presumption which they should have done."

Now turning aside to the accused's defence.

According to him on the 21st between 7 - 7.30 p.m. P.W.1 came to see him saying that he wanted to see him. One Mr. Christopher Hue was in the house. P.W.1 then told him that Shukor had come to see him (the accused) the previous day but that he (the accused) had not been at home.

P.W.1 then asked him casually whether he had his dinner or not. Upon which the accused invited him in, but since there was a friend in his house he did not want to come in.

The accused said that just before P.W.1 left

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(10) 1956 (M.L.J.) 130.

he took out some money, and handing it to him, said that Shukor gave this money to give it to Toh.

Toh is the Manager of the Union Trading Company.

The accused said that when he accepted the money he was under the impression that the money was for Toh. He said that one Christopher Hue was in the house then and he spoke to him about the money that was handed.

Toh, the Manager of the Union Trading Co., (D.W.2) said in his evidence that he knew Inspector Shukor, who was working in Rengam who owed round about $200/- on June 21st. He said that the accused knew that Shukor owed him money, by way of hire-purchase instalments. He also said that he knew P.W.1 and met him often.

Inspector Shukor (D.W.3) admitted he owed money to Toh for goods purchased. Christopher Hue D.W.4 said that he was in accused's house on June 21st, just before the Police case. He remembered the accused leaving the house once or twice and when he returned he inquired whether Shukor owed money to Toh.

This is briefly the gist of the accused's defence, in rebuttal of the presumption under Section 14 of the Prevention of Corruption Act, 1961 - a defence that was credible and one that could be reasonably true in the circumstances of the case, not the least circumstance being the silent workings and darker elements of P.W.1's character and disposition.

In the case of Loh Teck Chong v. P.P. (11) His Lordship Justice Ong, referring to the legal presumption raised by Section 14A of the Betting Ordinance, 1953, said:-

> ".....the legal presumption raised by Section 14A is a rebuttable one. It does not in any manner shut out closer scrutiny

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(11) 1966 1 M.L.J. 8.

In the Sessions Court of Johore at Batu Pahat

No. 2
Grounds of Judgment, 21st November, 1966.
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and evaluation of the evidence. On the contrary being so lightly raised, it imposes on the Courts a correspondingly heavier duty to be even more diligent to satisfy itself of the guilt of the accused before convicting."

The graveman of the charge against the accused is that he accepted a corrupt gratification for himself on June 21st from P.W.1 as an inducement for forbearing to do an act in relation to his principal's affairs.

In the Prevention of Corruption Act, Act II of 1947 (12) the learned authors state:-

> "It would be an outrage of commonsense and reason to infer that the presumption of innocence of the accused has itself been displaced and that the offence of bribery must be held to be established the moment the money passed into the possession of the accused without further proof that the money was "accepted" or "agreed to be accepted" for corrupt purpose."

In the circumstances it may be useful to ascertain the meaning of the word "accept" in section 4(a) of the Prevention of Corruption Act 1961.

> "'Accept' means to take or receive with a consenting mind. It is therefore upon the prosecution to prove not only the passing of the money into the hands of the accused, but also that he took it with a consenting mind. This would necessitate proof of either an agreement to accept prior to the actual acceptance or of his consent to accept the same as gratification at the time the money was offered." (13)

Was there an agreement prior to June 21st, to accept a corrupt gratification?

P.W.1's evidence must be scrutinised at this point.

According to him when he visited the accused's house on June 15th to pay $300/-, to the accused

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(12) R.B. Seth and R.L. Anand 3rd Edition, 1962 - at page 64.

(13) State v. Minaksten, A.I.R. 1952 Orissa 267 cited in the Prevention of Corruption Act Act II of 1947 by R.B. Seth and R.L. Anand 3rd Edition, 1962 - at page 65.

demanded from him a monthly payment of $250/- to which he agreed.

Now, could the subsequent action of P.W.1 in handing over $250/- to the accused on June 21st be a consequence of the antecedent agreement reached on June 15th.

The answer is categorically in the negative for two reasons.

Firstly, if P.W.1 in fact agreed on June 15th to make a monthly payment to the accused, it is impossible to reconcile the payment of $250/- only and only six days later on June 21st - and not on or about a month later.

Secondly, any speculative thought of an agreement reached on June 15th to make a monthly payment on June 15th, must be completely rejected in view of the specific finding, by the Court that P.W.1 never in fact visited the accused's house on June 15th.

The Court found as a fact that there was no agreement prior to June 21st to accept any corrupt gratification, to refrain from taking action against P.W.1 for operating the 36 character lottery.

The next question is:-

Did the accused consent to accept the money as a corrupt gratification at the time the money passed?

The evidence of P.W.1 as to the conversation that took place at the time of passing the money to the accused on June 21st must be scrutinised at this point.

He said:-

"Accused came out from the kitchen and he came up to me. He asked whether I had brought the money. I told I did. I further asked him whether he wanted to make use of the money. I handed him $250/-. The $250/- is my money. On 21st of June, I was acting on the instruction of D.S.P. Stevenson."

In the Sessions Court of Johore at Batu Pahat

No. 2
Grounds of Judgment, 21st November, 1966.
(Contd.)

At a later stage in his evidence-in-chief P.W.1 was asked by Prosecuting Counsel what he meant when he asked the accused whether he wanted to make use of the money and he replied:

"This money was monthly payment in respect of 36 character lottery run by my syndicate."

The Court was of the view, having seen and heard P.W.1 that the answer given by him in clarification was an after-thought and a fabrication, and his evidence as to the conversation that took place too unreliable and suspicious to be accepted without corroboration, direct or circumstantial, however slight.

It was found as a fact that at the time the money was passed to the accused, there was no consensus or agreement on his part to receive it as a corrupt gratification.

There is not a shred of evidence that the accused was expecting any gratification on June 21st - in fact according to P.W.1, that date was suggested by P.W.6 - not a shred of evidence from P.W.2 his partner, or any other partner, that accused was expecting a corrupt payment on June 21st, or that P.W.1 had reached an agreement to make a monthly payment to the accused - but one thing is clear - that on June 21st, the inexorable point of no return had been reached - P.W.1 had set in motion the machinery of the Anti-corruption Department - the accused was searched and sought for in Yong Peng, sent home, and inveigled into receiving the money with the story from P.W.1 that this money was from Inspector Shukor to Toh.

Under cross-examination the accused said that the money was not paid to him as a corrupt payment. He said he did not suspect anything and entirely believed what P.W.1 said while handing the money to him.

Having seen and heard the accused, the Court accepted this explanation as being probable and credible, in all the circumstances of this case.

The accused and Inspector Shukor, his predecessor now attached to Rengam were friends and class mates. Inspector Shukor, Toh and P.W.1 were

known to each other. P.W.1 was clearly in a position to ascertain from Toh that Inspector Shukor owed him money for purchase of goods. There was nothing therefore to arouse the suspicions of accused when the money was passed to him.

It was held in the case of Mehar Singh v. State of Pepsu (14) that:-

> "In a bribary case all that is required from the accused, and having regard to section 4 Prevention of Corruption Act (the presumption section) is to establish by evidence satisfying the judge of the probability that the amount was received or obtained by him innocently. If he establishes that probability, he has rebutted the presumption and is entitled to be acquitted."

On June 4th the accused conducted a raid - the integrity of that raid has never been in question - the report Ex.D10 he made after the raid has never been challenged - and it was on that day that accused chased P.W.1 from the scene of the raid, it was on June 4th that P.W.1's partners were arrested and locked up for the night, it was the very day that cash $341/- and betting slips were seized (and recorded by accused in Ex.D10) - and the following day, his partner was charged in Court - the count down for the point of explosion in P.W.1's mind had begun, because sooner or later the accused would have to give evidence in Court in the pending case against his partner - and therefore the psychological moment had arrived on June 21st to turn the tables on the accused.

There is one very pertinent question.

Why did the accused receive the $250/- from P.W.1 for Toh knowing or having ought to have known that P.W.1 was annoyed with him?

The answer is clear. P.W.1 was masquerading right up to June 21st as a friend - a friend whom

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(14) 1956 Persu 156: 1955 Cr. L.J. 1387 cited in Prevention of Corruption Act (Act II of 1947) by R.B. Seth and R.L. Anand, 3rd Edition, 1962.

In the High Court of Malaya

No. 4
Petition of Appeal, 1st March, 1967.

No. 4

PETITION OF APPEAL

IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU

IN THE STATE OF JOHORE

Johore Criminal Appeal No. of 1967

(Batu Pahat Sessions Court Arrest Case No.BA:51/66)

Public Prosecutor Appellant

vs

P. Yuvaraj
c/o District Police Headquarters,
Batu Pahat Respondent

PETITION OF APPEAL

The Honourable the Judge,
High Court, Malaya,
Johore Bahru.

The humble petition of the Public Prosecutor sheweth as follows:-

1. The respondent was charged in the Sessions Court, Batu Pahat, on 22nd June, 1966, as follows:-

> "That you on the 21st day of June, 1966 at about 7.40 p.m. at Quarters No. PWD.CJ.784 Jalan Labis, Yong Peng, in the State of Johore, being an agent of the Government of the States of Malaysia, to wit, a Police Inspector attached to Yong Peng Police Station, did corruptly accept gratification for yourself to wit $250/- cash, from one Ling Choon Seng as an inducement for forbearing to do an act in relation to your principal's affairs, to wit, to refrain from taking action against him for operating the illegal 36 digit lottery (Chee Fah), and that you thereby committed an offence punishable under Section 4(a) of the Prevention of Corruption Act No. 42 of 1961."

2. On 21st November, 1966, the respondent was acquitted and discharged of the said charge.

3. Your petitioner is dissatisfied with the order of the learned President on the grounds following:-

(i) The learned President was wrong to hold that the evidence of the complainant, P.W.1, was a tissue of lies, material contradictions and deliberate falsehoods as the evidence did not support these findings by the learned President;

(ii) The learned President was wrong in coming to the "irresistible conclusion beyond any reasonable doubt that P.W.1 was an unconscionable liar and a thoroughly unreliable witness" especially when P.W.1's evidence had been relied upon in calling the respondent to make his defence;

(iii) The learned President was wrong in coming to the conclusion that P.W.1 was masquerading right up to June 21st as a friend, a Judas who rang up to the accused on 21st June - "and what conversation, overtures or solicitations he made to the accused on the telephone was not disclosed by P.W.1 in his evidence", when there was absolutely no evidence whatsoever to support or even to suggest any such finding;

(iv) The learned President was wrong in rejecting the evidence of P.W.2 as not worthy of credit without adequate reason and similarly in respect of the evidence of P.W.9;

(v) The learned President while holding the view that no inference unfavourable to the prosecution may be drawn from the non-production of the cautioned statement made by the respondent, the learned President, nevertheless, commented adversely thereon;

(vi) The learned President was wrong in treating very minor and immaterial discrepancies in the prosecution evidence in such a way as if those were material and substantial discrepancies.

(vii) Having called the respondent to make his defence on the charge the learned President

In the High Court of Malaya

No. 4
Petition of Appeal, 1st March, 1967.
(Contd.)

was wrong to hold that the respondent's defence was "consistent and compatible with the superior probability of his innocence," whereas in actual fact the defence story was highly inconsistent with innocence, it was not one which could be said to be reasonably true and it created no reasonable doubt in the prosecution case; and

(viii) The acquittal of the respondent is against the weight of evidence and has occasioned a miscarriage of justice.

4. Wherefore your petitioner prays that the said order be reversed or annulled and such other order or orders be made thereon as justice may require.

Dated this 1st day of March, 1967.

(AJAIB SINGH)
Timbalan Penda'awa Raya.

VTN/W Filed this 4th day of March, 1967.

Sd. Monel bin Basir,
f. Chief clerk, Batu Pahat.

No. 5

In the High Court of Malaya at Johore Bahru

No. 5
Application for Reference under Section 66 of the Courts of Judicature Act, 1964, 9th June, 1967.

APPLICATION FOR REFERENCE UNDER SECTION 66 OF THE COURTS OF JUDICATURE ACT, 1964

IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU
IN THE STATE OF JOHORE

Johore Bahru Criminal Application No. of 1967

In the Matter of Johore Bahru Criminal Appeal No. 9 of 1967

Public Prosecutor — Appellant

vs

P. Yuvaraj — Respondent

APPLICATION FOR REFERENCE UNDER SECTION 66 OF THE COURTS OF JUDICATURE ACT, 1964

Public Prosecutor — Applicant

His Lordship the Judge,
High Court,
Johore Bahru.

The humble Application of the Public Prosecutor sheweth as follows:-

1. On 24th May, 1967 Your Lordship dismissed the appeal of the Public Prosecutor in Johore Bahru Criminal Appeal No. 9 of 1967.

2. The following point of law of public interest has arisen in the course of the appeal and the determination of which by Your Lordship has affected the event of the appeal which the Public Prosecutor is of the opinion should be reserved for the decision of the Federal Court pursuant to Section 66 of the Courts of Judicature Act, 1964:-

"Whether in a prosecution under Section 4(a) of the Prevention of Corruption Act, 1961, a Presumption of Corruption having been raised under Section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such

In the High Court of Malaya at Johore Bahru

fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (Section 3 Evidence Ordinance)."

No. 5
Application for Reference under Section 66 of the Courts of Judicature Act, 1964, 9th June, 1967.
(Contd.)

3. The Public Prosecutor's consent under sub-section (2) of section 66 of the Courts of Judicature Act, 1964, is attached as Annexure 'A'.

4. Wherefore your humble application applies that the point of law as aforesaid be reserved for the decision of the Federal Court.

Dated this 9th day of June, 1967.

Sd.

(AJAIB SINGH)

Timbalan Penda'awa Raya.

COPY

In the High Court of Malaya at Johore Bahra

No. 5
Application for Defence under section 66 of the Courts of Judicature Act 1964
9th June 1967
(Contd.)

COURTS OF JUDICATURE ACT, 1964

Consent under section 66(2)

In exercise of the powers conferred by section 66(2) of the Courts of Judicature Act, 1964, I, Abdul Kadir bin Yusof, Public Prosecutor, Malaysia, hereby consent to an application being made by the Deputy Public Prosecutor, to the Judge, High Court, Johore Bahru to reserve for the decision of the Federal Court a question of law of public interest which has arisen in the course of Johore Criminal Appeal No. 9 of 1967, Public Prosecutor vs. P. Yuvaraj and the determination of which by the Judge has affected the event of the said appeal.

Dated at Kuala Lumpur this 9th day of June, 1967.

Sgd. Tan Sri Abdul Kadir bin Yusof
Public Prosecutor,
Malaysia.

Annexe 'A'
9th June 1967.

(PAM. 15/67)

In the High Court of Malaya

No. 6
Notes of Argument, 16th July, 1967.

No. 6

NOTES OF ARGUMENT

IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU

JOHORE BAHRU HIGH COURT CRIMINAL APPEAL NO. 9 of 1967

Public Prosecutor — Appellant

vs

P. Yuvaraj — Respondent

APPLICATION FOR REFERENCE UNDER SECTION 66 OF THE COURTS OF JUDICATURE ACT, 1964

Public Prosecutor — Applicant

In Open Court
This 16th July, 1967.

NOTES OF ARGUMENT

D.P.P. Ajaib Singh for P.P./Applicant

D.R. Seenivasagam for Respondent

Application for a certificate under Section 66 of the Courts of Judicature Act.

Ajaib Singh says that the President had said he believed the probability of the story. Question whether this sufficient to rebut the presumption. So many cases have been foiled because of this. Public interest involved.

Application for certificate refused.

Sd. Ali

Certified true copy.

Sgd.

Secretary to Judge
16/11/1967.

No. 7

ORDER REFUSING APPLICATION

In the High Court of Malaya

No. 7
Order refusing Application, 16th July, 1967.

IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU

JOHORE BAHRU CRIMINAL APPEAL NO. 9 of 1967.

(B. Pahat Sessions Court Case No.BA.51/1966)

Public Prosecutor — Appellant / Applicant

P. Yuvaraj — Respondent

Coram: The Hon'ble Mr. Justice Ali
Judge, Malaya

In Open Court

This 16th day of July, 1967

ORDER

THIS Application for Reference under section 66 of the Courts of Judicature Act, 1964 coming on for hearing this day in the presence of Mr. Ajaib Singh, Senior Federal Counsel, on behalf of the above-named Applicant and Mr. D.R.Seenivasagam of Counsel for the above-named Respondent and upon hearing Counsel as aforesaid THIS COURT DOTH ORDER that the Application be and is hereby refused.

GIVEN under my hand and the Seal of the Court, this 16th day of July, 1967.

Sd.
Assistant Registrar,
High Court, Johore Bahru

To:-

1. Mr. Ajaib Singh, Sr. Federal Counsel, Attorney - General's Chambers, Kuala Lumpur.

2. Mr. D.R. Seenivasagam Advocate & Solicitor, No. 7, Hale Street, Ipoh, Perak.

3. The President Sessions Court, Batu Pahat.

In the Federal Court of Malaysia

No. 8
Notice of Motion, 20th July, 1967.

No. 8

NOTICE OF MOTION

IN THE FEDERAL COURT OF MALAYSIA

Criminal Application No. X 5 of 1957

BETWEEN:-

Public Prosecutor — Appellant / Applicant

and

P. Yuvaraj — Respondent

(In the matter of Johore Bahru Criminal Appeal No. 9 of 1967

BETWEEN:-

Public Prosecutor

and

P. Yuvaraj,

decided by the Honourable Mr. Justice Ali at High Court, Johore Bahru, the 24th day of May, 1967

and

In the matter of the Public Prosecutor's application for a reference to the Federal Court under section 66 of the Courts of Judicature Act, 1964, decided by the Honourable Mr. Justice Ali at High Court, Johore Bahru, the 16th day of July, 1967).

NOTICE OF MOTION

Take notice that on Monday the 7th day of August, 1967 at 10.00 o'clock in the forenoon or as soon thereafter as he can be heard Mr. Ajaib Singh, Senior Federal Counsel, of Counsel for the abovenamed applicant will move the Court for an order that the order made by the Honourable Mr. Justice Ali on the 16th day of July, 1967, whereby

his Lordship refused the application of the Public Prosecutor for a reference to the Federal Court under section 66 of the Courts of Judicature Act, 1964 be varied and that the question of law as set out in the application of the Public Prosecutor be reserved for the decision of the Federal Court.

Sd. Ajaib Singh
Senior Federal Counsel
and
Deputy Public Prosecutor.

Dated at Kuala Lumpur,
this 20th day of July, 1967.

Sd. Illegible.
Deputy Registrar
Federal Court, Malaysia
Kuala Lumpur.

To:
P. Yuvaraj,
or his Solicitor Mr. D.R. Seenivasagam,
No. 7 Hale Street,
Ipoh,
Perak.

The address of the appellant is Attorney-General's Chambers, Kuala Lumpur, Malaysia.

In the Federal Court of Malaysia

No. 9
Affidavit of Ajaib Singh, 20th July, 1967.

No. 9

AFFIDAVIT OF AJAIB SINGH

IN THE FEDERAL COURT OF MALAYA

Criminal Application No. of 1967

BETWEEN:-

Public Prosecutor — Appellant / Applicant

and

P. Yuvaraj — Respondent

AFFIDAVIT

I, Ajaib Singh, Senior Federal Counsel and Deputy Public Prosecutor of Attorney-General's Chambers, Kuala Lumpur, Malaysia, do solemnly and sincerely affirm and say as follows:-

1. I appeared for and on behalf of the Public Prosecutor in Batu Pahat Sessions Court Criminal Case No. BA 51/66 wherein the respondent was charged as follows:-

> "That you on the 21st day of June, 1966 at about 7.40 p.m. at Quarters No. PWD.CJ. 784 Jalan Labis, Yong Peng, in the State of Johore, being an agent of the Government of the States of Malaysia, to wit, a Police Inspector attached to Yong Peng Police Station, did corruptly accept gratification for yourself to wit, $250/- cash, from one Ling Choon Seng as an inducement forbearing to do an act in relation to your principal's affairs, to wit, to refrain from taking action against him for operating the illegal 36 digit lottery (Chee Fah), and that you thereby committed an offence punishable under section 4(a) of the Prevention of Corruption Act No. 42 of 1961."

2. On 21st November, 1966, the respondent was acquitted and discharged by the learned President of the Sessions Court. The appeal by the Public Prosecutor against the acquittal was dismissed by the Hon'ble Mr. Justice Ali at High Court, Johore Bharu,

on 24th May, 1967. Thereafter, the application by the Public Prosecutor under section 66 of the Courts of Judicature Act, 1964, was refused by his Lordship on 16th July, 1967.

3. In his grounds of decision the learned President, Sessions Court, after reviewing the evidence for the prosecution, held that since the cash amounting to $250/- had been received by the respondent the statutory presumption under section 14 of the Prevention Act, 1961, arose.

4. In dealing with the defence and the rebuttal of the onus of proof the learned President said "Having seen and heard the accused, the Court accepted his explanation as being probable and credible in all the circumstances of this case" and "With great respect, the Court was of the humble view, having weighed and estimated the force of each of the several circumstances in evidence, that the circumstances enumerated by the accused are consistent and compatible with the superior probability of his innocence".

5. The Hon'ble Mr. Justice Ali agreed with the learned President and dismissed the Public Prosecutor's appeal on 24th May, 1967.

6. In the course of my submission during the hearing of the appeal before the Honourable Mr. Justice Ali I cited the case of Saminathan & Ors. v. P.P. (1955) MLJ 121 wherein Buhagiar J. was of the view that 'proved' in a statutory presumption like 'unless the contrary is proved' means proved within the definition of 'proved' in the Evidence Ordinance. I also cited the case of P.P. v. Gurbachan Singh (1964) MLJ 141 wherein Hepworth J. does not agree with the views of Buhagiar J.

7. I also cited, with his Lordship's leave, three Indian authorities on similar provisions of the Prevention of Corruption Act, 1961, but only in so far as these may be persuasive because they are not binding on the Courts in Malaysia.

(a) D.V. Desai v State, AIR (1964) Supreme Court 575 where it was held that "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under section 114 of the Evidence Act and cannot be held to be

In the Federal Court of Malaysia

No. 9
Affidavit of Ajaib Singh, 20th July, 1967.
(Contd.)

discharged merely by reason of the fact that the explanation offered by the accused person is reasonable and probable. It must further be shown that the explanation is a true one".

(b) In State v. M. Narrottam AIR (1964) Gujerat 206, in allowing the appeal by the State the Court held "that the burden cannot be said to have been discharged by an explanation offered by the accused which explanation might be reasonable and probable and in this context the Court must bear in mind the definition of the word 'proof' occuring in section 3 of the Evidence Act".

(c) In DD Mishra v State of Maharashtra AIR (1967) Bombay, 1 it was held that when the presumption arises "the rebuttal must be by explanation supported by proof within meaning 3 of the Evidence Act and not merely by putting forth reasonable and probable story".

8. In view of the conflicting decision in J.B. Criminal Appeal No. 9 of 1967 and in Gurbachan Singh's case with that in Saminathan's case regarding the question of the rebuttal of the statutory presumptions it is humbly prayed that the Federal Court will be pleased to give an authoritative ruling for the guidance of the prosecution and the subordinate Courts.

Affirmed before me at Kuala Lumpur this 20th day of July, 1967, at 2.30 p.m.) Sd. Ajaib Singh

Sd. K. Ramachandran
Commissioner for Oaths

This Affidavit was filed by Mr. Ajaib Singh, Senior Federal Counsel and Deputy Public Prosecutor, Attorney-General's Chambers, Kuala Lumpur, Malaysia.

No. 10

FEDERAL COURT ORDER UNDER SECTION 66 OF THE COURTS OF JUDICATURE ACT, 1964

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT JOHORE BAHRU

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL APPLICATION NO: X.5 OF 1967

(Johore Bahru High Court Criminal Appeal No.9/67)

PUBLIC PROSECUTOR Applicant

vs

P. YUVARAJ Respondent

CORAM: AZMI, CHIEF JUSTICE, HIGH COURT, MALAYA;
ISMAIL KHAN, JUDGE HIGH COURT IN MALAYA;
and
GILL, JUDGE, HIGH COURT IN MALAYA.

IN OPEN COURT

THIS 7TH DAY OF OCTOBER, 1967

ORDER

UPON MOTION made unto Court this day by Mr. Ajaib Singh, Senior Federal Counsel for the Applicant in the presence of Mr. D.R. Seenivasagam of Counsel for the Respondent AND UPON READING the Notice of Motion dated the 20th day of July, 1967 and the Affidavit of Ajaib Singh affirmed on the 20th day of July, 1967, and filed herein AND UPON HEARING the Senior Federal Counsel and the Counsel for the Respondent IT IS ORDERED that the Order made at the High Court, Johore Bahru on the 16th day of July, 1967 refusing the application of the Public Prosecutor for a reference to the Federal Court, under Section 66 of the Courts of Judicature Act, 1964 be varied AND that the question of law as set out in the application of the Public Prosecutor be reserved for the decision of the Federal Court.

GIVEN under my hand and the seal of the Court this 7th day of October, 1967.

Sd. NG MANN SAU
DEPUTY REGISTRAR,
FEDERAL COURT, MALAYSIA.

In the Federal Court of Malaysia

No. 11

Notes of Argument recorded by Barakbah, L.P., 9th January, 1968.

No. 11

NOTES OF ARGUMENT RECORDED BY BARAKBAH, L.P.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

Federal Court Criminal Reference No. X 1 of 1967

(Johore Bahru High Court Criminal Appeal No.9 of 1967)

PUBLIC PROSECUTOR — Appellant

v

P. YUVARAJ — Respondent

Cor: Syed Sheh Barakbah, Lord President, Malaysia.
Azmi, Chief Justice, Malaya.
Ong Hock Thye, Judge, Federal Court.

NOTES OF ARGUMENT RECORDED BY SYED SHEH BARAKBAH, L.P.

9th January, 1968

Ajaib Singh for App.

D.R. Seenivasagam for Resp.

Ajaib Singh:

Refer to affidavit - para. 4.

Desai v. State of Maharastra - A.I.R. 1964 Sup. Ct. 575 (2nd para.)

It must be shown that the explanation is a true one.

Saminathan's case - 1955 M.L.J. 121.

Tong Peng Hong v. P.P. - 1955 M.L.J. 232.

D.R. Seenivasagam:

Desai's case.

C.A.V.

Sgd. S.S. Barakbah
9.1.68

19th February 1968.

Ajaib Singh for App.

Wong Soon Foh for Resp.

See judgment.

Sgd. S.S. Barakbah
19.2.68

TRUE COPY
(Tneh Liang Peng)
Secretary to the Lord President
Federal Court of Malaysia

27 Jun 1968.

No. 12

NOTES OF ARGUMENT RECORDED BY AZMI C.J.

In the Federal Court of Malaysia

No. 12
Notes of Argument recorded by Azmi, C.J., 9th January, 1968.

IN THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL REFERENCE NO. X 1 OF 1967

(Johore Bahru High Court Criminal Appeal No.9 of 1967)

PUBLIC PROSECUTOR — Appellant

vs

P. YUVARAJ — Respondent

Coram: S.S. Barakbah, Lord President, Malaysia;
Azmi, Chief Justice, Malaya;
Ong Hock Thye, Judge, Federal Court.

NOTES OF ARGUMENTS RECORDED BY AZMI CHIEF JUSTICE

Ajaib Singh for Public Prosecutor,

D.R. Seenivasagam for Respondent.

Kuala Lumpur. 9th January 1968

Ajaib Singh: Question asked:

"Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be discharged by a defence as being reasonable and probable or

Whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists (section 3 Evidence Ordinance)."

Refer page 94 - para. 4 to end.

In the Federal Court of Malaysia

No. 12
Notes of Argument recorded by Azmi, C.J., 9th January, 1968.
(Contd.)

I submit President wrong and that the standard of proof .....

A.I.R. 1964 S.C. 575 - Dhanvantrai Balwantrai Desai v. State of Maharastra.

3rd para: "Whereas under sec. 114 of the Evidence Act it is open to the Court to draw or not to draw ....."

I submit the burden .....

Saminathan's case - 1955 M.L.J. 121

Tong Peng Hong v. Public Prosecutor - 1955 M.L.J. 232.

Page 233: "Before proceeding further I would make certain observations of a general nature regarding statutory provisions of this sort ..... which leads to it."

I submit the Indian authority should be accepted.

Seenivasagam: Even in Indian cases - burden need be only reasonable.

Desai's case - page 575 "The words 'unless the contrary is proved'..... merely plausible ..... that it exists ..... cannot be said to be rebutted."

A.I.R. 1943 P.C. Otto George Gfeller v. The King.

Distinguished.

C.A.V. Sd. Azmi.

19th February, 1968

Coram: S.S. Barakbah, Lord President, Malaysia;
Azmi, Chief Justice, Malaya;
Ong Hock Thye, Judge, Federal Court.

Ajaib Singh for Appellant,

Wong Soon Foh for Respondent.

Question answered.

Sd. Azmi.

TRUE COPY

G.E. Ian,
Secretary to Chief Justice,
High Court, Malaya. 25/6/68

No. 13

NOTES OF ARGUMENT RECORDED BY ONG HOCK THYE, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL REFERENCE NO. X 1 OF 1967

(Johore Bahru High Court Criminal Appeal No. 9/67)

PUBLIC PROSECUTOR — Appellant

vs

P. YUVARAJ — Respondent

Coram: Syed Sheh Barakbah, Lord President, Malaysia;
Azmi, Chief Justice, Malaya;
Ong Hock Thye, Judge, Federal Court, Malaysia.

NOTES OF ARGUMENT RECORDED BY ONG, F.J.

Ajaib Singh for the appellant,

D.R. Seenivasagam for the respondent.

Ajaib Singh:

Question - whether in a prosecution under sec. 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act, the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (Section 3 Evidence Ordinance)."

p. 94 - (para 4).

In the Federal Court of Malaysia

No. 13

Notes of Argument recorded by Ong Hock Thye, F.J., 9th January, 1968.

(Contd.)

Desai - (1964) S.C. 575

Seenivasagam:

Reasonable and probable: Desai @ p. 575

C.A.V.

(Sd) H.T. Ong
9.1.1968

10

Certified true copy,

B.E. Nettar,
(B.E. Nettar)
Secretary to Judge,
Federal Court,
Malaysia, Kuala Lumpur.

No. 14

JUDGMENT OF ONG HOCK THYE, F.J.

In the Federal Court of Malaysia

No. 14
Judgment of Ong Hock Thye, F.J., 19th February, 1968.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL REFERENCE NO: X 1 OF 1967

(Johore Bahru High Court Criminal Appeal No. 9/67)

PUBLIC PROSECUTOR — Appellant

vs

P. YUVARAJ — Respondent

Coram: Syed Sheh Barakbah, Lord President, Malaysia;
Azmi, Chief Justice, Malaya;
Ong Hock Thye, Judge, Federal Court, Malaysia.

JUDGMENT OF ONG HOCK THYE, F.J.

The question of law referred to this Court pursuant to the provisions of section 66 of the Courts of Judicature Act, 1964 is as follows:

> "Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act, the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or
>
> whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists. (section 3 Evidence Ordinance)."

The facts are of little significance. Briefly, a trap set by a Chee Fah lottery operator for a

In the Federal Court of Malaysia

No. 14
Judgment of Ong Hock Thye, F.J., 19th February, 1968.
(Contd.)

police inspector resulted in his being found in possession of $250 of marked money. The defence claimed that it was a plant, the money being delivered by the agent provocateur himself on the pretext that it was towards repayment of a debt which the accused had been requested by and on behalf of a brother-officer to hand over to the creditor for goods sold. In an admirable and well-reasoned judgment the learned President of the Sessions Court, Mr. Sachithanandan, found the agent provocateur to be a witness wholly unworthy of credit, that in respect of the accused's alleged corrupt motive there was no corroboration of the evidence of this prosecution witness and that the court accepted the accused's explanation, not only "as being probable and credible in all the circumstances of the case" but also as "being consistent and compatible with the superior probability of his innocence." In the result the accused was acquitted. An appeal by the Public Prosecutor was dismissed by Ali J., who affirmed the decision of the learned President and subsequently also dismissed an application by the Public Prosecutor for a reference to this court of the question of law above set out. Upon a further application made unto this court on October 7, 1967 it was decided that, by reason of a conflict of judicial authority on the question of law arising in this case, it was proper that the reference should be entertained in accordance with the provisions of subsection 6(a) of Section 66 of the Act of 1964. We now pronounce our decision on such question.

Learned Senior Federal Counsel has called our attention to a number of authorities on the standard of proof required of the defence where, as here, under section 14 of the Prevention of Corruption Act, 1961, the phrase "until the contrary is proved," reverses the normal onus of proof by throwing it on the defence instead to negative a statutory presumption.

In Saminathan v. P.P. (1) Buhagiar J., in a customs case, said:

"The fundamental principle in criminal cases is that there is a burden on the prosecution,

(1) (1955) M.L.J. 121, 124

which never shifts to prove its case; it is not upon the accused to prove his innocence and in that sense the burden on the defence is not as high as that of the prosecution; to entitle the accused to an acquittal it is sufficient if he raises a doubt in the prosecution case and this he may do by "disproving" a material fact on which the prosecution relies or by proving facts from which it may be inferred that a material fact on which the prosecution relies is not so probable that a prudent man ought to act upon the supposition that that fact exists.

The facts on which the defence rely must however be "proved" and they are proved not by showing merely a possibility that such facts exist but by showing a probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case."

xxx xxx xxx

"In this case (Carr-Briant) the burden of proof on the accused was held to be the persuasive burden and that such burden was discharged by evidence to satisfy the jury of the probability of the existence of the fact which the statute requires him to prove.

In view of the Evidence Ordinance, 1950, I do not see how "proved" in any statutory presumption can mean anything but "proved" as defined in that Ordinance. Whatever view one may take of the policy of the legislation, there is also some policy in giving words a consistent meaning and that is hardly done if "proved" is given a different interpretation from that in the Evidence Ordinance, 1950."

We would observe that the ratio decidendi of the learned Judge is to be found in the last sentence quoted above.

However, in a later case, almost a decade later, P.P. v. Gurubachan Singh (2) Hepworth J. expressed a different view, thus:

(2) (1964) M.L.J. 141, 145.

In the Federal Court of Malaysia

No. 14
Judgment of Ong Hock Thye, F.J., 19th February, 1968.
(Contd.)

"As I indicated during the course of the argument, in my opinion the burden of proof under section 14 of the Prevention of Corruption Act, 1961, is the Carr-Briant burden of proof and not the Saminathan burden of proof. That is to say, the burden on an accused person under section 14 of the Prevention of Corruption Act, 1961, is no higher than that on a party to a civil action to prove his case on the balance of probabilities."

We are much indebted to learned Senior Federal Counsel, Mr. Ajaib Singh, for bringing to our attention the 1962 decision of the Supreme Court of India, on an appeal from the High Court of Bombay, in Dhanvantrai v. State of Maharastra (3). In that case the judgment of the court was delivered by Mudholkar J. concerning the effect of section 4(1) of the Prevention of Corruption Act of India, 1947 (which is in pari materia with s. 14 of the Malaysian Act) as follows:-

> "Mr. Chari contends that upon the view taken by the High Court it would mean that an accused person is required to discharge more or less the same burden for proving his innocence which the prosecution has to discharge for proving the guilt of an accused person. He referred us to the decision in Otto George Gfeller v. The King, A.I.R. 1943 P.C. 211 and contended that whether a presumption arises from the common course of human affairs or from a statute there is no difference as to the manner in which that presumption could be rebutted. In the decision referred to above the Privy Council, when dealing with a case from Nigeria, held that if an explanation was given which the jury think might reasonably be true and which is consistent with innocence, although they were not convinced of its truth, the accused person would be entitled to acquittal inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. That, however, was a case where the question before the jury

(3) A.I.R. (1964) S.C. 575

was whether a presumption of the kind which in India may be raised under s.114 of the Evidence Act could be raised, from the fact of possession of goods recently stolen, that the possessor of the goods was either a thief or receiver of stolen property. In the case before us, however, the presumption arises not under s. 114 of the Evidence Act but under s. 4(1) of the Prevention of Corruption Act. It is well to bear in mind that whereas under s. 114 of the Evidence Act it is open to the Court to draw or not to draw a presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the court to draw such presumption, under sub-section (1) of s. 4, however, if a certain fact is proved, that is, where any gratification (other than legal gratification) or any valuable thing is proved to have been received by an accused person the court is required to draw a presumption that the person received that thing as a motive or reward such as is mentioned in s. 161, I.P.C. Therefore, the Court has no choice in the matter, once it is established that the accused person has received a sum of money which was not due to him as a legal remuneration. Of course, it is open to that person to show that though that money was not due to him as legal remuneration it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under s. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the

In the Federal Court of Malaysia

No. 14
Judgment of Ong Hock Thye, F.J., 19th February, 1968.
(Contd.)

explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted."

The Indian Supreme Court appears to have adumbrated in 1957 this same view of the interpretation of section 4 when it expressed the opinion (which appears to have been obiter) that there was a "special burden of proof under section 4": see State of Madras v. Iyer. (4)

Its 1962 decision, binding on the High Courts, has subsequently been followed in State of Gujarat v. Madhavbhai (5) and Deonath Dudriath v. State of Maharastra (6).

We have carefully studied these judgments of the Indian Supreme Court, but in neither of them was there any reference to the well-known decision of the English Court of Criminal Appeal in R. v. Carr-Briant, (7) showing in what manner that decision on precisely the same question of law was considered as in any way distinguishable. It will be observed, on the other hand, that the Privy Council decision in Gfeller was cited and carefully distinguished.

Carr-Briant was a decision given by Humphreys J. (in a court which also comprised Viscount Caldecote C.J. and Lewis J.) after an exhaustive and meticulous examination of relevant authorities on the onus of proof and the conclusion which the Court of Criminal Appeal came to was expressed in the most unequivocal terms as follows:-

> "In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved," the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that

(4) A.I.R. (1958) S.C.61, 65.
(5) A.I.R. (1964) Gujarat 206
(6) A.I.R. (1967) Bom. 1.
(7) (1943) K.B. 607, 612.

required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

This classic judgment, so far as we have been able to advise ourselves, has been accepted without any breath of criticism throughout all common law countries since its pronouncement a quarter-century ago. It was not even expressly dissented from by the Supreme Court of India. Therefore, with the utmost respect, we would prefer the English decision in this conflict of judicial opinion. Our reasons may be stated briefly without any metaphysical indulgence in abstruse semantics. In the first place, it is undeniable that the Prevention of Corruption Acts of India and Malaysia were fashioned from the same mould, after the English Act. In the English Act the phrase "until the contrary is proved" is one with quite a hoary history. In England "proof" and "proved" in the administration of criminal justice has an accepted meaning under the common law too well-known to admit of argument and erosive distinctions in this day and age. The mere fact that section 3 of the Indian Evidence Act (and ours) defines and explains how and when a fact is said to be "proved" does not, and should not, in our opinion affect the quantum of proof in India or Malaysia, whether as regards the case for the prosecution or defence, any more than it can do so in England, from whose legislation the term "until the contrary is proved" was borrowed whole. If Dhanvantrai gave the true interpretation of those words it follows that they have a meaning and effect which is radically different from how they are construed in England and in other jurisdictions where the common law applies. And if we were to follow Dhanvantrai we should have to go the whole way, applying the same construction to all manner of legislation in which the same words appear.

In the second place, the burden that rests on the prosecution to prove its case beyond all reasonable doubt is a fundamental principle. As Lord Sankey said in Woolmington's case: (8)

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(8) (1935) A.C. 462, 481.

In the Federal Court of Malaysia

No. 14
Judgment of Ong Hock Thye, F.J., 19th February, 1968.
(Contd.)

"If at the end and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge, or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

With the greatest respect it seems to us that the distinction between "onus" in the two shades of meaning it possesses has not been drawn with sufficient precision in Dhanvantrai. It may mean the burden of proof in the sense that it is used, for instance, in section 101(2) of the Evidence Act, "when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Then there is section 103 which contains a proviso referring to reversal of this burden. On the other hand, onus may mean the quantum of proof, as that which is invariably required of the prosecution: see the passage in Woolmington above.

If we are not in error in reading the judgment of Mudholkar J., the quantum, in the sense of weight, of evidence required of a prisoner to answer the prosecution case differs according as a presumption raised against him is one of fact, (section 114) or is one of law, although admittedly rebuttable. As the learned judge put it: "The burden resting on the accused person in such a case (i.e. section 4 of the Prevention of Corruption Act) would not be as light as it is where a presumption is raised under section 114 of the Evidence Act." We regret, with all respect, that we cannot go along with that reasoning because, to take an example, there seems to us to be a clear contradiction presented by section 105 of the Evidence Ordinance as follows:-

"105. When a person is accused of any offence, the burden of proving the existence of circumstances, bringing the case within any of the general exceptions in the Penal Code, or within

any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him and the Court shall presume the absence of such circumstances."

Under this section there is an equally mandatory, though rebuttable, presumption but again so far as we are aware, the burden on the defence is discharged, for instance in the case of any of the five special exceptions raised to the offence of murder (see section 300 of the Penal Code), by evidence sufficient to the degree only of showing that the explanation may reasonably and probably be true. There is such a plethora of authorities which bear out the proposition so stated that citations from English, Indian or Malaysian cases are superfluous. See Parker v. Regina (8A).

Is the effect of section 3 of the Evidence Ordinance as to proof such as to require that, beyond an explanation which is both reasonable and probable, the defence would have to go further and, in the words of Mudholkar J., "show that the explanation is a true one?" The Courts in Malaysia have consistently followed the principle enunciated in Carr-Briant since long before that case: see Chia Chan Bah v. The King (9) and Azro v. P.P. (10) These cases and others, such as Liew Kaling v. P.P. (11) Looi Wooi Siak v. P.P. (12) have already anticipated our answer to this reference. In the last-mentioned case, Thomson C.J., after quoting from Lord Sankey's judgment in Woolmington, said "That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of that gold." The most recent pronouncement on this very point is that of Azmi C.J. in Wong Chooi v. P.P. (13):-

"In my view the law is quite clear, that where

(9) (1938) M.L.J.

(10) (1962) M.L.J. 321, 322.

(11) (1960) M.L.J. 306.

(12) (1962) M.L.J.

(8A) (1964) 2 A.E.R. 642, 652F

(13) (1967) 2 M.L.J. 180, 181.

In the Federal Court of Malaysia

No. 14
Judgment of Ong Hock Thye, F.J., 19th February, 1968.
(Contd.)

a burden is placed on an accused person to prove anything, by statute or common law, that burden is only a slight one and that this burden can be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence."

After all, as Buhagiar J. himself said in Saminathan, the facts on which the defence rely are "proved, not by showing a mere possibility that such facts exist, but by showing the probability of their existence, the degree of probability being a matter of prudence in the circumstances of the case." This standard is clearly different from and appreciably lower than that required of the prosecution. The presumption under section 14, be it emphasised, is a rebuttable one and if the explanation offered is one which may very well be true, how can it be said that the case for the prosecution, at the close of the trial, has been proved beyond reasonable doubt? A proper evaluation of the evidence relied on by the defence is vastly different from the imposition of a distinctly heavier onus. If "proof" were held to imply satisfaction to the point of belief in the very existence of a fact, instead of belief in the reasonable probability of its existence, then there can be no practical difference between the quantum of proof required of the defence and that laid on the prosecution. We do not think that is the law.

To conclude, with special reference to the instant case, the finding of fact of the learned President was not merely that the explanation was "reasonable and probable", which would have sufficed, but that it was "probable and credible" as well as "compatible with the superior probability of his innocence." Clearly, therefore, his decision was right in law and ought to be re-affirmed in this court as it had been affirmed by Ali J.

(Sgd.) H.T. ONG
JUDGE,
FEDERAL COURT, MALAYSIA.

Kuala Lumpur,
19th Feb. '68.

Mr. Ajaib Singh for Appellant /P.P.
Mr. D.R. Seenivasagam for Respondent.

Salinan yang di-akui benar.
B.E. Nettar.

Malaya,
Kuala Lumpur.

No. 15

ORDER OF FEDERAL COURT

In the Federal Court of Malaysia

No. 15
Order of Federal Court, 19th February, 1968.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL REFERENCE NO: 1 OF 1967
(Johore Bahru High Court Criminal Appeal No. 9/67)
(Batu Pahat Sessions Court Arrest Case No.51/66)

PUBLIC PROSECUTOR — Appellant

vs

P. YUVARAJ — Respondent

CORAM: SYED SHEH BARAKBAR, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;
AZMI, CHIEF JUSTICE, HIGH COURT IN MALAYA;
ONG HOCK THYE, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 19th DAY OF FEBRUARY, 1968

ORDER

THIS APPEAL from the decision of the Honourable Mr. Justice Ali having been referred to this Court under section 66 of the Courts of Judicature Act, 1964, coming on for hearing on the 9th day of January, 1968, in the presence of Mr. Ajaib Singh, Deputy Public Prosecutor, on behalf of the Appellant and Mr. D.R. Seenivasagam of Counsel for the Respondent:

AND UPON READING the Record of Reference herein AND UPON HEARING the arguments of the Deputy Public Prosecutor and Counsel for the Respondent as aforesaid IT WAS ORDERED that this Reference do stand adjourned for judgment AND the same coming for judgment this day in the presence of Mr. Ajaib Singh, Deputy Public Prosecutor and Mr. Wong Soon

In the Federal Court of Malaysia

No. 15
Order of Federal Court, 19th February, 1968.
(Contd.)

Foh, on behalf of Mr. D.R. Seenivasagam of Counsel for the Respondent:

THIS COURT DOTH FIND that in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act, the burden of rebutting such presumption can be said to be discharged by a defence as being reasonable and probable. 10

GIVEN under my hand and the seal of the Court this 19th February, 1968.

Sgd. AU AH WAH

CHIEF REGISTRAR,
FEDERAL COURT, MALAYSIA.

No. 16

No. 16
Order allowing final leave to appeal to His Majesty the Yang di-Pertuan Agong, 28th August, 1968.

ORDER ALLOWING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

Seal

COURTS OF JUDICATURE ACT, 1964

(No. 7 of 1964)

ORDER UNDER SECTION 76(1).

WHEREAS there was this day submitted to His Majesty the Yang di-Pertuan Agong a Report from the Lords of the Judicial Committee of the Privy Council dated the 20th day of June, 1968 in the words following, viz:-

"WHEREAS by virtue of the Malaysia (Appeals to Privy Council) Orders in Council 1958 and 1963 there was referred unto this Committee a humble Petition of the Public Prosecutor in the matter of an Appeal from the Federal Court of Malaysia (Appellate Jurisdiction) between the Petitioner and P. Yuvaraj Respondent setting forth that the Petitioner prays for special leave to appeal from the Judgment and Order of the Federal Court of Malaysia dated the 19th February 1968 whereby the said Federal Court decided a question of law referred to it pursuant to the provisions of section 66 of the Courts of Judicature Act 1964 as a question of law of public interest which had arisen in the course of and had affected the determination of an Appeal by the Petitioner to the High Court in Malaya at Johore Bahru in the State of Johore from the Judgment and Order of the Sessions Court Batu Pahat dated the 21st day of November 1966 acquitting the Respondent of a charge punishable under section 4(a) of the Prevention of Corruption Act 1961: that the Petitioner appealed against the acquittal and discharge of the Respondent by the said Sessions Court to the said High Court which

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on the 24th May 1967 dismissed the said Appeal: that on the 9th June 1967 the Petitioner applied to the said High Court to reserve a point of law for the decision of the Federal Court of Malaysia: that on the 16th July 1967 the said High Court refused the said application: that by Notice of Motion dated the 20th July 1967 the Petitioner appealed from the same refusal to the Federal Court of Malaysia which on the 7th October 1967 made an Order referring the said question for decision and which by Judgment and Order dated the 19th February 1968 decided the said question: And humbly praying the Head of Malaysia to grant him special leave to appeal from the Judgment and Order of the Federal Court of Malaysia dated the 19th February 1968 deciding the question of law referred to it or for such further or other relief:

THE LORDS OF THE COMMITTEE in obedience to the said Orders in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar in opposition thereto Their Lordships do this day agree to report to the Head of Malaysia as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment and Order of the Federal Court of Malaysia dated the 19th February 1968 on condition that the Petitioner lodges an undertaking in the Privy Council Registry that whatever be the result of the Appeal no further proceedings be pursued against the Respondent in respect of this charge and Their Lordships do further report that the proper officer of the said Federal Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before the Judicial Committee on the hearing of the Appeal."

NOW, THEREFORE, His Majesty the Yang di-Pertuan Agong having taken the said Report into consideration was pleased to approve thereof and

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to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

DATED this 28th day of August, 1968.

BY COMMAND

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MINISTER OF JUSTICE

(BAHAMAN BIN SAMSUDIN)

(F.C. CRIM. REF. X.1/67)

No. 28 of 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

BETWEEN :-

PUBLIC PROSECUTOR — APPELLANT

- and -

P. YUVARAJ — RESPONDENT

RECORD OF PROCEEDINGS

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